

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:CTR:HAR:TL-N-7359-99
CJSantaniello

date:

DEC 20 1999

to: Chief, Examination Division
Connecticut-Rhode Island District
Attn: Revenue Agent Rick Mika, Group 1108, through Case Manager Pat McGovern

from: District Counsel, Connecticut-Rhode Island

ject: Large Case Advisory Opinion - [REDACTED]

THIS DOCUMENT INCLUDES CONFIDENTIAL INFORMATION SUBJECT TO THE ATTORNEY-CLIENT AND DELIBERATIVE PROCESS PRIVILEGES AND SHOULD NOT BE DISCLOSED TO ANYONE OUTSIDE THE SERVICE, INCLUDING THE SUBJECT TAXPAYER. THIS DOCUMENT ALSO CONTAINS TAX RETURN INFORMATION SUBJECT TO THE PROVISIONS OF I.R.C. § 6103 AND ITS USE WITHIN THE SERVICE SHOULD BE LIMITED TO THOSE WITH A NEED TO REVIEW IT.

We are responding to your memorandum dated December 2, 1999, in which you request legal advice regarding the appropriate manner to extend the statute of limitations for [REDACTED], which no longer exists, for its short year ending [REDACTED]. For the reasons set forth below, we believe that [REDACTED], a successor of [REDACTED]'s successor, is the proper party to extend the limitations period for [REDACTED]'s consolidated tax liabilities for the period in question. We, therefore, recommend that you obtain Form 872 (using the language set forth below) from [REDACTED], which is primarily liable for [REDACTED]'s tax liability for that year. Although we do not believe it is necessary for [REDACTED] to agree to assume and pay [REDACTED]'s consolidated liability in this case as a transferee because it is already primarily liable for the tax, you may obtain a signed Form 2045 from [REDACTED] if you wish to do so out of an abundance of caution. We do not, however, recommend that you obtain Form 977 from [REDACTED] at this time.

We are simultaneously submitting this memorandum to the National Office for post-review and any guidance they may deem appropriate. Consequently, you should not take any action based on the advice contained herein during the 10-day review period. We will inform you of any modification or suggestions, and, if necessary, we will send you a supplemental memorandum incorporating any such recommendation.

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Issues

(1) Who is the proper party to extend the statute of limitations on assessment for [REDACTED] for its consolidated tax liability for the short period ending [REDACTED]?

(2) What is the proper language to use on the Form 872 for [REDACTED] for its consolidated tax liability for the short period ending [REDACTED]?

(3) Should the Service also obtain a Form 2045 from [REDACTED] regarding its liability as a transferee of a transferee of [REDACTED] for [REDACTED]'s consolidated tax liability for the short taxable period ending [REDACTED]?

(4) If the answer to issue (3) is yes, should the Service also obtain Form 977 from [REDACTED] to extend the limitations period for its transferee liability?

Facts

This case involves an audit of [REDACTED]'s short year ending [REDACTED]. Prior to that date, [REDACTED] ([REDACTED], a Delaware corporation, was the common parent of an affiliated group. As reflected on the affiliations schedule (Form 851) attached to its Form 1120 for the period ending [REDACTED] [REDACTED] had [REDACTED] subsidiaries as of that date.

On [REDACTED], the taxpayer merged with [REDACTED] ([REDACTED], which became the new common parent of the former [REDACTED] consolidated group. In connection with this merger, the taxpayer's shareholders received [REDACTED] stock in exchange for their shares. [REDACTED] was a Massachusetts corporation.

Thereafter, on [REDACTED], [REDACTED] merged with [REDACTED], with [REDACTED] ([REDACTED] becoming the new common parent. In exchange for their shares in [REDACTED] and [REDACTED], the shareholders of those corporations received [REDACTED] % and [REDACTED] %, respectively, of the stock in the newly-created [REDACTED], a Delaware corporation.

The statute of limitations on assessment for [REDACTED]'s short year ended [REDACTED] expires on [REDACTED]. The examination team has requested our assistance in determining who is the proper party to execute the Form 872 on [REDACTED]'s behalf. The team has also prepared Form 977 (Consent to Extend the Time to Assess Liability at Law or in Equity for Income, Gift, and Estate

Tax Against a Transferee or Fiduciary) and Form 2045 (Transferee Agreement), requesting that we review the proposed language on those forms. Under the Form 2045, [REDACTED] agrees to assume and pay all of [REDACTED]'s consolidated tax liabilities for its short year ending [REDACTED].

Discussion

(1) Forms 872

Under I.R.C. § 6501(c)(4), the Service and the taxpayer may consent in writing to extend the time for making an assessment if the consent is executed before the normal period of assessment or a previously-extended period expires. The regulations under section 6501(c)(4) do not specify who may sign consents executed under that section with respect to consolidated returns. Instead, the rules pertaining to statute extensions for consolidated returns are contained in Treas. Reg. § 1.1502-77(a) and Temp. Treas. Reg. § 1.1502-77T.

The common parent of a consolidated group is the sole agent for each subsidiary in the group for all matters regarding the tax liability for the group's consolidated return year. Treas. Reg. § 1.1502-77(a). This agency continues for as long as the common parent remains in existence under state law, even if consolidated returns are not filed in subsequent years or corporations join or leave the group. Treas. Reg. § 1.502-77(a); Craigie, Inc. v. Commissioner, 84 T.C. 466, 474 (1985). Thus, the common parent is generally the proper party to sign consents to extend the period of limitations on assessment for all members of the group. Treas. Reg. § 1.1502-77(a).

This general rule does not apply when the common parent is no longer in existence. Under this rule, if the common parent no longer exists, a waiver of the statute of limitations may be signed by an "alternative agent," as defined in Temp. Treas. Reg. § 1.1502-77(a)(3). Under Temp. Treas. Reg. § 1.1502-77(a)(4)(ii), a waiver may be signed by "[a] successor to the former common parent of the group in a transaction to which section 381(a) applies."

In this case, when [REDACTED] merged into [REDACTED] on [REDACTED] [REDACTED] it ceased to exist under Delaware law on that date. See 8 Del. Code § 259(a) (1996). Because the merger under Delaware law qualifies as a reorganization under I.R.C. § 368(a)(1)(A), it is a transaction to which I.R.C. § 381(a) applies. Thus, as the surviving corporation, [REDACTED] became an "alternate agent" for the taxpayer under Treas. Reg. § 1.1502-77T(a)(4)(ii).

As noted above, however, [REDACTED] no longer exists by virtue of the [REDACTED] merger with [REDACTED] in which [REDACTED] became the new common parent. See Mass. Gen. Laws Ann., chapter 156B, § 80(a)(1) (1992). Because the merger constitutes a transaction to which section 381(a) applies, [REDACTED] became [REDACTED]'s alternative agent under Temp. Treas. Reg. § 1.1502-77T(a)(4)(ii), and thus the proper party to execute the Form 872 on behalf of [REDACTED] for its short period ending [REDACTED]. Although Temp. Treas. Reg. § 1.1502(a)(4)(ii) does not expressly include a successor of a successor as an alternative agent, we believe that the reference to "[a] successor of the old common parent" is sufficiently broad to include [REDACTED] as [REDACTED]'s alternative agent. See generally Bardarracco v. Commissioner, 464 U.S. 386 (1984) (statutes of limitation must be strictly construed in favor of the government). We, therefore, recommend that [REDACTED] execute the Form 872 with the following language at the top of page one:

[REDACTED] (EIN [REDACTED]), as successor in interest of [REDACTED] (EIN [REDACTED]), successor in interest of [REDACTED] (EIN [REDACTED]), and as agent for the [REDACTED] group*.

_____ [at the bottom of the form]

* regarding the consolidated tax liability of the [REDACTED] group for the consolidated return year ending [REDACTED]

This language makes it clear that [REDACTED] is signing both in its capacity as [REDACTED]'s successor (because it is primarily liable) and in its capacity as agent for the [REDACTED] group (because it is the successor). Additionally, the form 872 should be signed by an authorized officer of [REDACTED] and that the corporation's name in the signature block of the form should be "[REDACTED]."

(2) Forms 2045

As noted above, the examination team intends to secure Forms 2045 and 977 from [REDACTED] as transferee of [REDACTED] a transferee of [REDACTED]. Form 2045 does not involve "successor liability" (as does Form 872), but rather transferee liability under section 6901. By executing Form 2045, [REDACTED] would assume and agree to pay [REDACTED]'s tax liabilities for its taxable year ending [REDACTED]. See Turnbull v. Commissioner, 393 F.2d 91, 94 (5th Cir.

1967); Sanderling, Inc. v. Commissioner, 66 T.C. 743, 746 n4 (1976). The Form 2045 does not, however, operate to extend the statute of limitations on assessment against [REDACTED].

As [REDACTED]'s successor in the [REDACTED] merger, [REDACTED] is primarily liable for [REDACTED]'s consolidated tax liability for the short period ending [REDACTED]. Mass. Gen. Laws Ann. chapter 156B, § 80(b). Accordingly, the Form 2045, which would impose secondary liability as a transferee, is unnecessary in this instance. If, however, you desire to secure Forms 2045 from [REDACTED] and [REDACTED], we suggest that you use the following language:

[REDACTED]
Transferee - [REDACTED]
Transferor - [REDACTED]
Name - [REDACTED] successor in interest to [REDACTED]

[REDACTED]
Transferee - [REDACTED]
Transferor - [REDACTED] successor in
interest to [REDACTED]
Name - [REDACTED]

The period for assessing initial transferee liability expires within one year after the period of assessment against the transferor expires. I.R.C. § 6901(c)(1). In the case of the liability of a transferee of a transferee, the limitations period expires one year after the expiration of the limitation for assessment against the preceding transferee. Section 6901(c)(2). Thus, the statute of limitations on transferee liability expires for [REDACTED] on [REDACTED] and for [REDACTED] on [REDACTED]. Accordingly, the Forms 2045 should be secured from both [REDACTED] and [REDACTED] before [REDACTED].

(c) Form 977

Form 977 is used to extend the statute of limitations on transferee liability. As previously discussed, the statute of limitations for [REDACTED]'s and [REDACTED]'s transferee liability will not expire under section 6901 (c)(1) and (c)(2) until [REDACTED] and [REDACTED], respectively. The Form 977 proposed by the examination team bears an extended statute date of [REDACTED]. Consequently, the date on the Form 2045 is earlier than the date on which the statute expires by operation of law, which

defeats the purpose of obtaining the extension in this case. Furthermore, since the limitations period does not expire against [REDACTED] for at least [REDACTED] months, we suggest that you refrain from obtaining a Form 977 from that corporation until a point in time more proximate to [REDACTED].

Since there is no further action required by this office, we are closing our file in this matter. Please call Carmino J. Santaniello at (860) 290-4075 if you have any questions or require further assistance.

GERALD A. THORPE
District Counsel

By: _____
CARMINO J. SANTANIELLO
Attorney